No. 6167

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

UNITED STATES OF AMERICA,
Appellant.

vs.

SIDNEY T. BURLEYSON,
Appellee.

APPELLEE'S PETITION FOR A REHEARING.

JOHN L. McNAB,
S. C. WRIGHT,
Crocker First National Bank Building, San Francisco.
Attorneys for Appellee and Petitioner.

No. 6167

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

UNITED STATES OF AMERICA,
Appellant.

vs.

SIDNEY T. BURLEYSON,
Appellee.

APPELLEE'S PETITION FOR A REHEARING.

To the Honorable William B. Gilbert, Presiding Judge, and to the Associate Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

The appellee, Sidney T. Burleyson, by his attorneys John L. McNab and S. C. Wright, respectfully prays that this court grant a rehearing in this case, and in support of such prayer submit the following reasons:

The court in reversing the judgment said:

"General Order No. 387, promulgated June 6, 1929, delegates authority to regional managers to effect final denial of claims for insurance benefits, in accordance with the provisions of that order, but prior to that time so far as we are advised authority to effect such denial was vested in the director of the Bureau alone. At least, our attention has not been directed to any provision of

> law, or any regulation promulgated by the director, vesting any such authority in a Rating Board, or an individual member of such Board; and upon independent investigation we have found none. The court below was therefore without jurisdiction; and under such circumstances any discussion of the merits by this court would be out of place."

The government, in its brief, did not dwell on the lack of authority in the Rating Board to deny the claim. For that reason we did not cite authorities on that question and therefore give the court the benefit of the authorities set forth in this petition.

General Order No. 387, promulgated June 6, 1929, has no application to the facts in the instant case.

Appellant's demand for his war risk insurance payments was made and denied on December 14, 1926, long prior to June 6, 1929, when General Order No. 387 was promulgated, and the action was commenced on May 24, 1929, also prior to the promulgation of said General Order No. 387.

We beg to differ with the court that prior to the promulgation of General Order No. 387 that the sole and exclusive authority to effect final denial of claims for insurance benefits was vested in the director of the Bureau alone, and in support of this contention we call the court's attention to an opinion of Hon. William D. Mitchell, Attorney General of the United States, rendered while he was Solicitor General, in the case of Edward Shields Cross (17-70-8) rendered January 23, 1929. The question arose as to whether

an appeal should be recommended involving the question of whether a disagreement existed with the Bureau under Section 19. In commenting upon the procedure regarding the presentation of claims for insurance, Mr. Mitchell said:

> "I understand from conferences with the Bureau's representatives that the regulations provide that ratings are made in the first instance by the claims and rating board, and that these ratings cover both compensation cases *and insurance cases;* that Regulation 74 provides that the decision of the claims and rating board shall be final unless appeal is taken to the Central Board of Appeals, and there is a regulation that if the veteran is dissatisfied with the decision of the Central Board he may appeal to the Director, who has an advisory group on appeals who make recommendations as to his action * * *
>
> A decision of a rating board, not appealed from, has the same effect as would a personal decision by the director. It represents the decision of the Bureau on the claim.
>
> In this case, as I understand it, no appeal was taken by the veteran from the decision made in 1925 by the claims and rating board, holding that he was not permanently and totally disabled, and no such appeal having been taken and no new evidence presented by him, under the regulations the decision of the claims and rating board was the final decision of the Bureau."

A reading of this opinion discloses that the Rating Board of the Veterans' Bureau has the power and authority to adjudicate claims for both compensation and *insurance* purposes.

Further commenting upon the finality of the ruling of the Rating Board, Mr. Mitchell said:

> "The fundamental question in this type of case is whether, if a decision is rendered, which is the decision of the Bureau, by a board to which has been lawfully delegated the power to make a decision for the Bureau, there is a disagreement between the claimant and the Bureau within the meaning of the statute. The contention of the Bureau, as I understand it, is that since the veteran is given the right of appeal from the decision of the claims and rating board, if he does not exercise it he acquiesces in and agrees to the decision of the claims and rating board, and consequently there is no disagreement.
>
> This argument leads to the conclusion that no veteran may maintain a suit against the United States on his contract of insurance until he has exhausted by various appeals all the remedies given him by the regulations of the Bureau. I think it is very doubtful whether such a contention will be sustained. The courts are very likely to hold that the statute does not provide that he must have exhausted every recourse within the Bureau. It merely provides that there shall be a disagreement, and if there is a decision against the claimant by a board having lawful power to make it, and whose decision is the decision of the Bureau, and final unless appeal is taken to a higher board or official, that decision constitutes a disagreement between the veteran and the Bureau on the claim * * *
>
> At the conference it was suggested that there may be a distinction between a case where denial of the rating of permanent and total disability is a reversal of former action, and a case where the

denial of permanent and total disability is the first and original ruling on the claim. I see no ground for distinction between these two classes of cases. It makes no difference in principle whether the claims and rating board in denying the claim for permanent and total rating is acting for the first time or reversing a former decision.

The question in either case is whether a decision denying the claim made by a board to which lawful authority is delegated operates to produce a disagreement within the meaning of the statute, or whether it is necessary for the veteran to exhaust his remedies by appeal within the Bureau before it can be said that there is a disagreement. In either type of case the question is whether by failing to appeal within the Bureau the veteran has accepted and agreed to the award against him. Of course, the regulations providing for appeals within the Bureau were intended to insure to the veteran every possible chance of a full and fair hearing by one board after another before he should be compelled to resort to litigation, but these regulations would work greatly to the disadvantage of the veteran in many cases by postponing his right to suit and delaying the institution of the suit pending a succession of Bureau appeals * * *

If the regulations for successive appeals within the Bureau were intended to benefit the veteran by giving him every opportunity to secure justice, why inflict them on him, if he does not want to take advantage of the right to appeal? After all, speedy results are what the veterans want, and where the *initial board has decided against him, and he thinks it a waste of effort to appeal or that he will get a quicker settlement by suit, why prevent it?*

In my judgment, if there is an adverse decision on a claim by any board or tribunal within the Bureau to whom has been lawfully delegated the power to act on it, *that constitutes a disagreement* between the claimant and the Bureau, and the claimant is not required, as a condition precedent to suit, to take all the appeals and demand all the rehearings which the Bureau regulations permit, and he cannot properly be said to consent to and acquiesce in the Bureau's decision because he brings a suit instead of resorting to appeals within the Bureau.

William D. Mitchell,
Solicitor General."

In the case of *U. S. v. Jensen,* 36 Fed. (2d) 47, the Government quoted in their supplemental brief, General Order No. 302 of the Veterans Bureau, dated January 31, 1925, and which is as follows:

"U. S. Veterans' Bureau,
January 31, 1925.

General Order No. 302

Subject: Permanent Total Ratings for Compensation and Insurance Purposes.

The following General Order is hereby promulgated for observance by all officers and employees of the U. S. Veterans' Bureau:

1. Effective February 16, 1925, the Claims and Rating Boards of the several regional offices will review all claims for permanent, total disability and regional offices shall make payments for such compensation. The ratings as made by the Claims and Rating Boards shall be final, except in (a) below, for compensation or insurance purposes subject only to final action by the Central Board

of Appeals or an area unit thereof, in case of an appeal.

a. Where it is clear that an erroneous rating has been made such rating shall be returned to the regional office and attention called to the error in question prior to the adjudication of insurance by the Central Office.

2. In all cases where a claimant shall be rated permanently and totally disabled for compensation or *insurance purposes,* the following evidence shall be submitted to the Central Office, attention of the Claims Division:

a. A signed copy of the proceedings of the Claims and Rating Board with the rating—This shall be a signed first carbon of the original rating.

b. In case of non-concurrence by any member or members, a signed minority report giving reasons for non-concurrence as provided in paragraph 5 of General Order No. 279.

c. Copy of the entire award brief face certified to by the Chief of the Claims Division, together with a certificate over his signature showing that the claimant's rights have not been forfeited by reason of the provisions of Section 23 of the World War Veterans' Act 1924.

3. When claimants have been rated permanently and totally disabled under paragraph 1 above, the claimant's case file will be retained in the regional office unless for some reason the Central Office will continue payments of compensation.

4. Where a claimant is rated permanently and totally disabled for insurance purposes only, his case file will be retained in the Regional Office and the information required under Section 2 of this

order immediately forwarded to the Central Office, attention Claims Division, for consideration of insurance benefits.

5. Upon receipt in the Central Office of the documents above outlined, the Claims Division will secure the insurance file and proceed to adjudicate the benefits of insurance, and if payable, checks will be issued in accordance with finance instructions.

6. Upon an appeal from a decision of the Claims and Rating Board to the Central Board of Appeals, the entire case file, including the rehabilitation folder, shall be forwarded to Central Office or to the section of the Board assigned for duty in the area in which the appeal is made. The Area Board will make three signed copies of its decision. One signed copy shall be forwarded to Central Office, attention Claims and Insurance Service, and the original copy securely fastened in the case file and forwarded to the Claims Division of the regional office transmitting the appeal.

7. All permanent total ratings under the provisions of this General Order shall show the date of receipt of proof of permanent and total disability.

8. All foreign relation cases are to be adjudicated in the Central Office and any claims cases of this character located in the regional offices will be at once forwarded to the Central Office.

9. Section 7155 (a) of Regulation No. 74, which contains matters of procedure, is hereby modified accordingly.

Frank T. Hines,
Director."

Vol. 1, page 968, Regulations U. S. Veterans' Bureau.

We submit that the denial of appellee's claim for war risk insurance benefits by the Rating Board constitutes a disagreement between the Bureau and the appellee, within the meaning of the letter of the Attorney General, and General Order No. 302, and therefore this petition for a rehearing should be granted.

The cases cited in the opinion of the court, viz: *Manke v. United States,* 38 Fed. (2d) 624; and *Bernsten v. United States,* 41 F. (2d) 663, do not hold to the contrary.

In the *Manke* case the court held that:

> "A 'disagreement' must arise before an action can be brought, or, in other words, such a 'disagreement' constitutes a condition precedent to the right to institute and maintain an action, and for that reason is jurisdictional. * * *"

The court said:

> "They not only failed to prove that a disagreement existed, *but it is in effect conceded that in fact there has been no such disagreement.* * * *"

This appellee made no such admission, but on the contrary, he has persistently claimed that a "disagreement" existed, and that he has sufficiently proved such "disagreement." It is not claimed by the court that the "disagreement" must be evidenced by any writing, but that the denial of insurance benefits was vested in the director of the Bureau alone. This, we submit, is contrary both to the opinion of the Attorney General of the United States rendered while he was Solicitor General, and to General Order No. 302.

In the case of *Bernsten v. United States,* supra, this court said:

> "The disagreement contemplated by the statute must be a rejection by the government through the Bureau of the very claim which the applicant later presents by his suit."

Neither the court nor counsel for the government contended that the claim presented by appellee to the Bureau for allowance was *not* the claim presented by his suit.

In the case of *Starnes v. United States,* 13 F. (2d) at p. 213, the court said:

> "The whole scheme of war risk insurance was designed to benefit men who thus served, and who, for any cause during the period of their service, became disabled. Great liberality of construction must therefore be indulged. * * *"

This court decided to the same effect in the case of *U. S. v. Sligh,* 31 F. (2d) 736.

The whole case was fought out on the *disagreement.* The government vigorously contested the fact of the veteran's disability and produced much evidence in an attempt to disprove it. After producing testimony on the fact of disagreement, is it not anomalous to suggest there was no disagreement?

Applying said rule of liberal construction to the facts in the case at bar as the court is required to do, and in the light of the opinion of the Attorney General, and General Order No. 302, we submit that the

disagreement was sufficiently proved, and that a rehearing should be granted.

Dated, San Francisco,
November 5, 1930.

JOHN L. MCNAB,
S. C. WRIGHT,
Attorneys for Appellee and Petitioner.

CERTIFICATE OF COUNSEL.

We hereby certify that we are of counsel for appellee and petitioner in the above entitled cause, and that in our judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact, and that said petition for a rehearing is not interposed for delay.

Dated, San Francisco,
November 5, 1930.

JOHN L. MCNAB,
S. C. WRIGHT,
Attorneys for Appellee and Petitioner.